

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

NATURAL RESOURCES DEFENSE  
COUNCIL,

Plaintiff,

v.

17 Civ. 3519 (LAK)

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant.

**DECLARATION OF ASSISTANT UNITED STATES ATTORNEY**  
**DOMINIKA TARCZYNSKA**

I, DOMINIKA TARCZYNSKA, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am an Assistant United States Attorney in the Office of Joon H. Kim, Acting United States Attorney for the Southern District of New York, attorney for Defendant United States Environmental Protection Agency (“EPA”). I am the attorney assigned to the defense of this matter and am familiar with the proceedings herein. I make this declaration on information and belief in support of Defendant’s Response to the Motion for a FOIA Production Deadline filed by Plaintiff Natural Resources Defense Council (“NRDC”), ECF No. 14.

2. Attached hereto as **Exhibit A** is a true and correct copy of an email dated June 28, 2017 that I sent to counsel for NRDC, which, *inter alia*, sought clarification regarding Part 3 of the April 3, 2017 FOIA request that is the subject of Plaintiff’s Motion for FOIA Production Deadline (referred to herein as the “April 3 FOIA Request”). The attachment to the June 28, 2017 email is not relevant to Plaintiff’s motion and has not been included in this exhibit.

3. Attached hereto as **Exhibit B** is a true and correct copy of an email dated July 31, 2017 that I sent to counsel for NRDC conveying EPA's search proposal for Parts 2 and 3 of the April 3 FOIA Request.

4. Attached hereto as **Exhibit C** is a true and correct copy of an email that I received on August 1, 2017 from counsel for NRDC in response to EPA's July 31, 2017 proposal.

5. Attached hereto as **Exhibit D** is a true and correct copy of an email dated August 3, 2017 that I sent to counsel for NRDC conveying a second search proposal from EPA for Parts 2 and 3 of the April 3 FOIA Request.

6. Attached hereto as **Exhibit E** is a true and correct copy of an email that I received on August 4, 2017 from counsel for NRDC in response to EPA's August 3, 2017 proposal.

7. Attached hereto as **Exhibit F** is a true and correct copy of an email dated August 10, 2017 that I sent to counsel for NRDC conveying a third search proposal from EPA for Parts 2 and 3 of the April 3 FOIA Request.

8. Attached hereto as **Exhibit G** is a true and correct copy of an email that I received on August 11, 2017 from counsel for NRDC in response to EPA's August 10, 2017 proposal.

9. Attached hereto as **Exhibit H** is a true and correct copy of an email dated August 14, 2017 that I sent to counsel for NRDC.

10. Attached hereto as **Exhibit I** is a true and correct copy of an email dated August 25, 2017 that I sent to counsel for NRDC conveying a fourth search proposal from EPA for Parts 2 and 3 of the April 3 FOIA Request.

11. Attached hereto as **Exhibit J** is a true and correct copy of an email that I received on August 31, 2017 from counsel for NRDC in response to EPA's August 25, 2017 proposal.

12. Attached hereto as **Exhibit K** is a true and correct copy of an email dated September 1, 2017 that I sent to counsel for NRDC responding to her August 31, 2017 email.

13. Attached hereto as **Exhibit L** is a true and correct copy of a joint letter NRDC and EPA submitted to the Court via Federal Express on September 14, 2017.

I declare under penalty of perjury that the foregoing is true and correct.

New York, New York  
October 11, 2017

/s/ Dominika Tarczynska  
DOMINIKA TARCZYNSKA

E

**From:** [Tarczynska, Dominika \(USANYS\)](#)  
**To:** "Rahm, Cassie"  
**Subject:** NRDC v. EPA  
**Date:** Wednesday, June 28, 2017 10:20:00 PM  
**Attachments:** [signed recusal statement.pdf](#)

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Cassie,

Attached please find a document that is being released in full by EPA in response to FOIA requests EPA-HQ-2017-005963 and EPA-HQ02017-004720.

I would like to ask you to reconsider NRDC's broad definition of "outside parties" in #3 of the April 3 FOIA as anyone outside the executive branch. As it is written, the request is overly broad and does not reasonably describe the records sought. *See Oklahoma v. E.P.A.*, No. CIV-13-726-M, 2013 WL 6714167, at \*3 (W.D. Okla. Dec. 18, 2013) (finding that the inclusion of "Other Organizations" makes the FOIA request clearly overbroad and does not reasonably describe the records sought because it would "would require the EPA to search for and determine the organizational mission of any non-governmental organization that may have communicated with the EPA regarding topics under the CAA."); *see also Landmark Legal Found. v. DOJ*, 211 F. Supp. 3d 311, 319 (D.D.C. Sept. 30, 2016) (deeming request "invalid" and "unreasonable" where it sought "all the personal emails and other forms of communication by all employees within the three divisions named, along with other Department of Justice employees in leadership positions"); *Freedom Watch, Inc. v. Dep't of State*, 925 F. Supp. 2d 55, 61 (D.D.C. 2013) (requests for "'all' records that 'relate to' [several] subject area[s]" were "invalid *ab initio*").

I look forward to speaking with you tomorrow.

Dominika

Dominika Tarczynska  
Assistant United States Attorney  
Southern District of New York  
86 Chambers Street, 3rd Floor  
New York, NY 10007  
Tel: (212) 637-2748  
Fax: (212) 637-2686  
[dominika.tarczynska@usdoj.gov](mailto:dominika.tarczynska@usdoj.gov)

E

**From:** [Tarczynska, Dominika \(USANYS\)](#)  
**To:** ["Rahm, Cassie"](#)  
**Subject:** RE: NRDC v. EPA -- Response to Part 1 April 3, 2017 FOIA  
**Date:** Monday, July 31, 2017 4:57:00 PM

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Cassie,

EPA proposes the following custodians and search terms to cover the remainder of the request:

**Individuals searched:**

Administrator Scott Pruitt  
Mike Flynn (Acting Deputy Administrator)  
Ryan Jackson (Chief of Staff)  
John Reeder (Deputy Chief of Staff)  
Byron Brown (Deputy Chief of Staff Policy)  
Kevin Minoli (General Counsel)  
Samantha Dravis (Associate Administrator Office of Policy)

**Dates searched:**

January 20-April 3, 2017

**Search terms:**

- "sue and settle"
- "oral directive"
- "Hewitt"

In light of EPA's response on Part 1 of the April 3, 2017 request that no "memo" exists, EPA proposes that NRDC send a new FOIA request asking for the documents returned by these searches. EPA expects that it can produce these documents by along the same time frame as the other FOIA requests in this litigation—with production to be completed by October 31, 2017.

Let me know if it would be useful to discuss.

Regards,

Dominika

Dominika Tarczynska  
Assistant United States Attorney  
Southern District of New York  
86 Chambers Street, 3rd Floor  
New York, NY 10007  
Tel: (212) 637-2748  
Fax: (212) 637-2686  
[dominika.tarczynska@usdoj.gov](mailto:dominika.tarczynska@usdoj.gov)

E



**From:** Rahm, Cassie  
**To:** [Tarczynska, Dominika \(USANYS\)](#)  
**Subject:** RE: NRDC v. EPA -- Response to Part 1 April 3, 2017 FOIA  
**Date:** Tuesday, August 01, 2017 4:43:34 PM

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Dominika,

NRDC doesn't see this proposal as a reasonable search for documents responsive to parts 2 and 3 of the April 3 request. We also don't understand why NRDC should submit another FOIA request just because Administrator Pruitt said "memo" when he apparently should have said "oral directive." Can you please explain EPA's reasoning on that?

NRDC proposes the custodians, dates, and search terms below for parts 2 and 3 of the request.

To clarify, we are seeking all documents and communications concerning the oral directive itself (which is part 2 of the request), as well as communications with parties outside the executive branch concerning the change in policy (which is part 3 of the request).

Custodians (the additions to EPA's proposal are in bold)

Headquarters

Administrator Scott Pruitt

**ANY SUPPORT STAFF INVOLVED IN FACILITATING COMMUNICATIONS TO OR FROM  
ADMINISTRATOR PRUITT**

Mike Flynn (Acting Deputy Administrator)

Ryan Jackson (Chief of Staff)

John Reeder (Deputy Chief of Staff)

Byron Brown (Deputy Chief of Staff Policy)

Kevin Minoli (General Counsel)

**Elise Packard (Acting Principal Deputy General Counsel)**

**Erik Baptist (Senior Deputy General Counsel)**

**David Fotouhi (Deputy General Counsel)**

**Justin Schwab (Deputy General Counsel)**

**Richard Albores (Associate Deputy General Counsel)**

Samantha Dravis (Associate Administrator Office of Policy)

**Brittany Bolen (Deputy Associate Administrator Office of Policy)**

**Shannon Kenny (Principal Deputy Associate Administrator Office of Policy)**

**Troy Lyons (Associate Administrator, Office of Congressional and Intergovernmental Relations)**

**Robin H. Richardson (Principal Deputy Associate Administrator, Office of Congressional and Intergovernmental Relations)**

**George Hull (Acting Associate Administrator, Office of Public Affairs)**

**Julia Valentine (Acting Director, Office of Media Relations)**

**Sarah Sowell (Acting Director, Office of Internal Communications)**

Region 1

**Deborah Szaro, Acting Regional Administrator**

**Doug Gutro, Office of Public Affairs**  
**Carl Dierker, Regional Counsel**

**Region 2**

**Catherine R. McCabe, Acting Regional Administrator**  
**Walter Mugdan, Acting Deputy Regional Administrator**  
**Richard Manna, Assistant Regional Administrator, Office of Policy and Management**  
**Eric Schaaf, Director, Office of Regional Counsel**  
**Mary Mears, Director, Public Affairs Division**

**Region 3**

**Cecil A. Rodrigues, Acting Regional Administrator**  
**John A. Armstead, Acting Deputy Regional Administrator**  
**Michael D'Andrea, Director, Office of Communications and Government Relations**  
**Diana Esher, Assistant Regional Administrator, Office of Policy and Management**  
**Mary B. Coe, Regional Counsel**

**Region 4**

**V. Anne Heard, Acting Regional Administrator**  
**Kenneth Lapierre, Acting Deputy Regional Administrator**  
**Mita Ghosh, Acting Chief of Staff**  
**Allison Wise, Office of Government Relations Director**  
**Mary J. Wilkes, Regional Counsel**  
**Vickie Tellis, Acting Assistant Regional Administrator, Office of Policy and Management**

**Region 5**

**Robert A. Kaplan, Acting Regional Administrator**  
**Cheryl Newton, Acting Deputy Regional Administrator**  
**Leverett Nelson, Regional Counsel**

**Region 6**

**Samuel Coleman, Acting Regional Administrator**  
**Jim Payne, Regional Counsel**

**Region 7**

**Edward H. Chu, Acting Regional Administrator**  
**Karen Flournoy, Acting Deputy Regional Administrator**  
**Curtis Carey, Director, Office of Public Affairs**  
**Mike Brincks, Director, Office of Policy and Management**  
**Leslie Humphrey, Acting Regional Counsel**

**Region 8**

**Deb Thomas, Acting Regional Administrator**  
**Suzanne Bohan, Acting Deputy Regional Administrator**  
**Andrew Mutter, Director, Office of Communications and Public Involvement**

**Kenneth Schefski, Regional Counsel**

**Region 9**

**Alexis Strauss, Acting Regional Administrator**  
**Deborah Jordan, Acting Deputy Regional Administrator**  
**Kelly Zito, Director, Office of Public Affairs**  
**Sylvia Quast, Regional Counsel**

**Region 10**

**Michelle Pirzadeh, Acting Regional Administrator**  
**Dan Opalski, Acting Deputy Regional Administrator**  
**Nancy Lindsay, Assistant Regional Administrator**  
**Joyce Kelly, Director/Chief of Staff**  
**Allyn Stern, Regional Counsel**

One reason we've listed senior employees of the regional offices is that Administrator Pruitt expressly said the so-called "memo" was sent to "our regions."

As to any of the people I've added to EPA's proposed custodianlist, if EPA represents that the person has had nothing to do with this directive or policy (or communications about the directive or policy), we would accept that, and not insist that you run a search on his or her files.

**Dates:**

January 20, 2017 through whatever date EPA begins the search.

*See Ferguson v. DOE*, 2011 WL 4089880 at \*11 (S.D.N.Y. Sept. 13, 2011) ("In this District and elsewhere, courts have found that the date on which the agency *commences* its search is an appropriate cut-off date." (citing cases))

**Search terms:**

"sue and settle"

"oral directive"

"Hewitt"

"settlement" in the same sentence as "policy" or "guideline" or "guidance" or "practice"

"consent decree" in the same sentence as "policy" or "guideline" or "guidance" or "practice"

Please let me know if you'd like to discuss further.

Thanks,  
Cassie

---

**From:** Tarczynska, Dominika (USANYS) [mailto:Dominika.Tarczynska@usdj.gov]

**Sent:** Monday, July 31, 2017 4:57 PM

**To:** Rahm, Cassie <crahm@nrdc.org>

**Subject:** RE: NRDC v. EPA -- Response to Part 1 April 3, 2017 FOIA

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**From:** [Tarczynska, Dominika \(USANYS\)](#)  
**To:** ["Rahm, Cassie"](#)  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Thursday, August 03, 2017 10:47:00 AM

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Cassie,

The search that NRDC proposes goes far beyond the terms of its original April 3, 2017 FOIA request.

The additional search terms that you propose would capture settlement related documents that have nothing to do with the March 29, 2017 statement quoted in your FOIA request—which is limited to documents related to a “a memo . . . to say that the days of sue and settle, the days of consent decrees governing this agency where the EPA gets sued by an NGO, a third party, and that third party sets the agenda, sets the timelines on how we do rulemaking, and bypassing rulemaking entirely have ended.”

Accordingly, in addition to the terms EPA previously proposed, we propose adding the following terms in red below. EPA is testing these additional terms now and I will confirm as soon as I can whether the additional proposed terms are reasonably targeted to capture potentially responsive documents and the timeframe for production of any responsive, non-exempt documents.

**Search terms:**

“sue and settle”

“oral directive”

“Hewitt”

“settlement” in the same sentence as ~~“policy” or “guideline” or “guidance” or “practice”~~ **“timeline” or “rulemaking”**

“consent decree” in the same sentence as ~~“policy” or “guideline” or “guidance” or “practice”~~ **“timeline” or “rulemaking”**

With respect to custodians, EPA is willing to search communications contained in Outlook files of the custodians identified below. As you’ll see we have accepted the bulk of the additional custodians proposed by NRDC. It is my understanding that regional policy or public affairs folks would not have any records related to a litigation/settlement issues. With respect to your additional proposed catch all for “support staff” to Administrator Pruitt, the individuals at HQ who are already listed as custodians would be the “support staff” that work with the administrator. Anything to lower staff would be duplicative of what is transmitted to these higher level HQ staff. Please be aware though that the addition of all of these new custodians and the additional search terms will likely increase the time frame for search, review, and production for responsive documents.

**Custodians:**

**Headquarters**

Administrator Scott Pruitt

~~ANY SUPPORT STAFF INVOLVED IN FACILITATING COMMUNICATIONS TO OR FROM  
ADMINISTRATOR PRUITT~~

Mike Flynn (Acting Deputy Administrator)

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John Reeder (Deputy Chief of Staff)

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**Mita Ghosh, Acting Chief of Staff**

~~Allison Wise, Office of Government Relations Director~~

**Mary J. Wilkes, Regional Counsel**

**Vickie Tellis, Acting Assistant Regional Administrator, Office of Policy and Management**

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~~Mike Brincks, Director, Office of Policy and Management~~

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~~Kelly Zito, Director, Office of Public Affairs~~

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**Michelle Pirzadeh, Acting Regional Administrator**  
**Dan Opalski, Acting Deputy Regional Administrator**  
**Nancy Lindsay, Assistant Regional Administrator**  
**Joyce Kelly, Director/Chief of Staff**  
**Allyn Stern, Regional Counsel**

Finally, with respect to time frame, EPA's decision to search communications through April 3, 2017, the date of NRDC's request is eminently reasonable and supported by applicable regulations. See 40 CFR § 2.103(a) ("In determining which records are within the scope of a request, an [EPA] office will ordinarily include only those records in its possession as of the date of the request was received in Headquarters or Regional FOI Office. If any other date is used, the office will inform you of that date."). The case that you cited does not stand for the proposition that the agency is always required to search for documents through the date of its search. To the contrary, it makes clear that the reasonableness of the time frame of the search depends on the circumstances of the case. See *Ferguson v. U.S. Dep't of Educ.*, No. 09 CIV. 10057 FM, 2011 WL 4089880, at \*10–11 (S.D.N.Y. Sept. 13, 2011). Here, the FOIA request itself substantiates the reasonableness of such a date restriction – it references a statement made on March 29, 2017 and was submitted a few days after that statement, seeking documents related to a memo and/or the subject matter of the memo referenced in that statement. EPA is not required to search for records that are beyond the scope of that original request. See *Negley v. F.B.I.*, 766 F. Supp. 2d 190, 195–96 (D.D.C. 2011) ("Defendant's assumption that Plaintiff's 2002 request was limited to documents in existence at the time of his request and within the scope of the request was eminently reasonable"), *aff'd*, No. 11-5296, 2012 WL 1155734 (D.C. Cir. Mar. 28, 2012).

As I indicated above, EPA is testing these additional searches now. I should be able to get you a new estimated production date by the end of this week or early next week.

Regards,

Dominika

Dominika Tarczynska  
Assistant United States Attorney  
Southern District of New York  
86 Chambers Street, 3rd Floor  
New York, NY 10007  
Tel: (212) 637-2748  
Fax: (212) 637-2686



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**From:** Rahm, Cassie  
**To:** [Tarczynska, Dominika \(USANYS\)](#)  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Friday, August 04, 2017 9:12:27 PM

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Dominika,

Thank you for the response. I think we are getting closer, but NRDC still does not think this is a reasonable search for records responsive to the April 3 request

First, part of your email suggests a misunderstanding about the request. You say our proposed search terms might capture documents unrelated to “the March 29, 2017 statement quoted in your FOIA request.” But our FOIA request does not seek documents related to the statement as such. We quoted the statement to illustrate the “memo” and “subject matter” we’re talking about. The request seeks documents concerning the memo and its subject matter—not the radio show statement itself. That also explains why your proposed alteration to the final two search terms makes them too narrow. While Administrator Pruitt happened to use the words “timeline” and “rulemaking” when talking to Mr. Hewitt, that doesn’t suggest others at the agency (or even Pruitt himself) necessarily use those words when discussing this directive or policy. As a result, we can’t see how those terms are reasonably likely to capture the documents to which we’re entitled.

If the terms we proposed end up capturing some unresponsive documents, those can be weeded out before production. But if the search is too narrow, that’s unfixable; some responsive documents will never be captured.

Second, on custodians, we’ll accept your representation that the folks whose names you crossed out don’t have responsive documents. On the support staff issue, though, I want to clarify what we’re talking about: we want to ensure that communications intended to be received personally by Administrator Pruitt, or intended to have been sent personally by him, but that are technically sent to or from someone else’s machine or someone else’s account, are searched. Please add any such person to the list of custodians. (Or please represent that you know that no such person exists.)

Finally, we strongly disagree with April 3 as a cut-off date for the search. The fact that our request references a statement made on March 29 does not remotely suggest that the agency did not continue to generate responsive documents about the oral directive or policy change after April 3. In fact, we think it’s very likely that the agency did continue to generate responsive documents. As a result, the reason courts require a date-of-search cutoff is entirely applicable here: it would make no sense to require NRDC to submit another FOIA request that is identical to the April 3 request in every respect other than having a later date, when the agency still hasn’t even started a search for documents responsive to the April 3 request. *Ferguson*, 2011 WL 4089880 at \*11 (plaintiff “should not have to submit [a new request] to obtain relevant records that were created between the date of the Request and the date that OPE commenced its search”). The *Negley* case in your email is really not on point; among other things, the defendant there *did* use the date of its search as the cut-off date, so that wasn’t even at issue, see 766 F. Supp. 2d at 195 n.8. Second, the Court relied in its discussion on the fact that the plaintiff had submitted a much later and still-pending FOIA request, see *id.* at 196 (“Here, it was reasonable for the FBI to use a cut-off date of April 2002 [for a

January 2002 request], when it was aware that it would also have to respond to Plaintiff's broader 2009 request."). There is no analogous (much-later, still-pending) request here.

I'm around on Monday if you think talking on the phone about any of this would be helpful.

Best,  
Cassie

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**From:** Tarczynska, Dominika (USANYS) [mailto:Dominika.Tarczynska@usdj.gov]  
**Sent:** Thursday, August 03, 2017 10:47 AM  
**To:** Rahm, Cassie <crahm@nrdc.org>  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA

Cassie,

The search that NRDC proposes goes far beyond the terms of its original April 3, 2017 FOIA request.

The additional search terms that you propose would capture settlement related documents that have nothing to do with the March 29, 2017 statement quoted in your FOIA request—which is limited to documents related to a “a memo . . . to say that the days of sue and settle, the days of consent decrees governing this agency where the EPA gets sued by an NGO, a third party, and that third party sets the agenda, sets the timelines on how we do rulemaking, and bypassing rulemaking entirely have ended.”

Accordingly, in addition to the terms EPA previously proposed, we propose adding the following terms in red below. EPA is testing these additional terms now and I will confirm as soon as I can whether the additional proposed terms are reasonably targeted to capture potentially responsive documents and the timeframe for production of any responsive, non-exempt documents.

**Search terms:**

“sue and settle”

“oral directive”

“Hewitt”

“settlement” in the same sentence as ~~“policy” or “guideline” or “guidance” or “practice”~~ **“timeline” or “rulemaking”**

“consent decree” in the same sentence as ~~“policy” or “guideline” or “guidance” or “practice”~~ **“timeline” or “rulemaking”**

With respect to custodians, EPA is willing to search communications contained in Outlook files

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**From:** Tarczynska, Dominika (USANYS)  
**To:** "Rahm, Cassie"  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Thursday, August 10, 2017 10:57:00 AM

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Cassie,

We reiterate the position that the search terms that you propose go beyond the four corners of the April 3 FOIA request. The request quotes a specific statement which refers to a memo on a particular topic. The search terms EPA proposed are reasonably targeted to locate documents potentially responsive to that request. As you are undoubtedly aware, "a FOIA petitioner cannot dictate the search terms for his or her FOIA request. Rather, a federal agency has discretion in crafting a list of search terms that they believe to be reasonably tailored to uncover documents responsive to the FOIA request." *Immigrant Def. Project v. United States Immigration & Customs Enf't*, No. 14-cv-6117, at \*4 (S.D.N.Y. 2016). However, in an effort to reach resolution and avoid litigation on the adequacy of the search, EPA is prepared to add "policy" to its previously proposed search terms:

**Search terms:**

"sue and settle"

"oral directive"

"Hewitt"

"settlement" in the same sentence as "policy" or ~~"guideline"~~ or ~~"guidance"~~ or ~~"practice"~~ "timeline" or "rulemaking"

"consent decree" in the same sentence as "policy" or ~~"guideline"~~ or ~~"guidance"~~ or ~~"practice"~~ "timeline" or "rulemaking"

EPA is likewise prepared to search for responsive documents through today—with the caveat that documents related to responding to NRDC's FOIA request be excluded from the search.

Additionally, as I indicated in my email below, EPA will be searching only the Outlook files of the approximately 50 custodians identified below. As email is the primary form of communication for agency communications, we expect that this should capture most responsive documents and a search of local files or hard copy files is unlikely to locate many additional potentially responsive files and would be very burdensome and time consuming.

If we reach agreement on search parameters, we would expect that NRDC would not challenge the adequacy of the search with respect to this FOIA request in summary judgment briefing. Please let me know if we have a common understanding in this regard.

As a result of the diagnostics that EPA ran of these search terms through April 3, 2017, it anticipates that there are approximately 5,000 potentially responsive documents that will need to be reviewed. They are now rerunning the diagnostics for the time period from April 3, 2017 to today, so I cannot at this time provide you an estimated date of production. However, their estimated date for production when the request cut-off-date was April 3, was approximately February or March 2018. Depending on the additional numbers of potentially responsive records generated by doubling the

time period of the search, the estimated date of production will be correspondingly later. We may not have the diagnostic results back by the end of the week.

Regards,

Dominika

Dominika Tarczynska  
Assistant United States Attorney  
Southern District of New York  
86 Chambers Street, 3rd Floor  
New York, NY 10007  
Tel: (212) 637-2748  
Fax: (212) 637-2686  
[dominika.tarczynska@usdoj.gov](mailto:dominika.tarczynska@usdoj.gov)

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**From:** Rahm, Cassie [mailto:[crahm@nrdc.org](mailto:crahm@nrdc.org)]  
**Sent:** Friday, August 04, 2017 9:12 PM  
**To:** Tarczynska, Dominika (USANYS) <[DTarczynska@usa.doj.gov](mailto:DTarczynska@usa.doj.gov)>  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA

Dominika,

Thank you for the response. I think we are getting closer, but NRDC still does not think this is a reasonable search for records responsive to the April 3 request

First, part of your email suggests a misunderstanding about the request. You say our proposed search terms might capture documents unrelated to “the March 29, 2017 statement quoted in your FOIA request.” But our FOIA request does not seek documents related to the statement as such. We quoted the statement to illustrate the “memo” and “subject matter” we’re talking about. The request seeks documents concerning the memo and its subject matter—not the radio show statement itself. That also explains why your proposed alteration to the final two search terms makes them too narrow. While Administrator Pruitt happened to use the words “timeline” and “rulemaking” when talking to Mr. Hewitt, that doesn’t suggest others at the agency (or even Pruitt himself) necessarily use those words when discussing this directive or policy. As a result, we can’t see how those terms are reasonably likely to capture the documents to which we’re entitled.

If the terms we proposed end up capturing some unresponsive documents, those can be weeded out before production. But if the search is too narrow, that’s unfixable; some responsive documents will never be captured.

Second, on custodians, we’ll accept your representation that the folks whose names you crossed out don’t have responsive documents. On the support staff issue, though, I want to clarify what we’re

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**From:** Rahm, Cassie  
**To:** Tarczynska, Dominika (USANYS)  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Friday, August 11, 2017 9:29:08 PM

---

Dominika, here is NRDC's response to the points in your last email:

On the search terms: We would accept your deletion of "guideline" and "guidance" from the final two searches as long as you add back the word "practice." While we can see how "guideline" and "guidance" are somewhat synonymous with "policy," we do not think the same can be said of "practice." So we propose:

"sue and settle"

"oral directive"

"Hewitt"

"settlement" in the same sentence as "policy" or "practice" or "timeline" or "rulemaking"

"consent decree" in the same sentence as "policy" or "practice" or "timeline" or "rulemaking"

On searching only Outlook files: While we will not ask for full searches of all 50 custodians' hard copy and local electronic files, a reasonable search would include at least asking each custodian (or at least those who work in EPA headquarters) whether they have reason to believe they have responsive hard copy or local electronic files. If they answer no, then fine. But if they say yes, then those documents should be located and produced. This would take minimal effort yet would likely turn up any significant responsive documents that exist outside of Outlook.

On the estimated production date: We cannot agree to an estimated production date of later than March 2018 for a request made on April 3, 2017. Even if the search turned up more than 5,000 documents, that is not a reasonable timeframe. NRDC might consider accepting March 2018 as a final date for a *last wave* of production if EPA agreed to a rolling production that had a series of earlier deadlines—for instance, responsive documents from Administrator Pruitt's files by mid-September, responsive documents from the files of Flynn, Jackson, Reeder, Brown and Minoli by mid-October, and so on. But forcing NRDC to wait more than a year to see a *single responsive document* on a topic of public concern—something that has been frequently touted by Administrator Pruitt as a major policy change for the agency—is unreasonable.

On the agreement to the adequacy of the search: If we can agree on the parameters of the search outlined above, NRDC would not challenge the adequacy of that as an initial search in summary judgment briefing. My "initial search" qualifier is there because we cannot forgo the right to ask for an additional search regarding this request (and if necessary file a motion over it) if something significant were to turn up in the production that warrants an additional search. For instance, if the initial production reveals that three key people at the agency used a specific unanticipated catchphrase to describe this policy or directive, it might be necessary to do one more search using only that catchphrase in those three people's files. I have no way of knowing whether something like this will happen, but as you probably have experienced, searches can occasionally be an iterative process, and NRDC can't waive its rights now to some such future argument. Please let me know if that is at all unclear, or if you'd like to talk on the phone.



Best,  
Cassie

CATHERINE MARLANTES RAHM  
*Staff Attorney*

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NEW YORK, NY 10011  
212.727.4628  
[CRAHM@NRDC.ORG](mailto:CRAHM@NRDC.ORG)

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**From:** [Tarczynska, Dominika \(USANYS\)](#)  
**To:** "Rahm, Cassie"  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Monday, August 14, 2017 4:17:00 PM

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Cassie,

I will respond to the points in your email separately. However, I wanted to let you know that we just got the analytics back and EPA estimates 25,000 documents that will need to be reviewed for responsiveness if we use the search terms identified in my August 10 email through that date (rather than April 3). Clearly that is an incredibly burdensome and time consuming review process that cannot be done anywhere near the timeframe that NRDC is asking for. We need to reevaluate the search terms to determine if they are in fact reasonably targeted to identify potentially responsive documents—these numbers suggest that they are not.

Maybe we can set up a time to talk tomorrow afternoon. I need time to regroup with EPA, so later in the day is better for me.

Thanks,

Dominika

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**From:** Rahm, Cassie [mailto:[crahm@nrdc.org](mailto:crahm@nrdc.org)]  
**Sent:** Friday, August 11, 2017 9:29 PM  
**To:** Tarczynska, Dominika (USANYS) <[DTarczynska@usa.doj.gov](mailto:DTarczynska@usa.doj.gov)>  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA

Dominika, here is NRDC's response to the points in your last email:

On the search terms: We would accept your deletion of "guideline" and "guidance" from the final two searches as long as you add back the word "practice." While we can see how "guideline" and "guidance" are somewhat synonymous with "policy," we do not think the same can be said of "practice." So we propose:

"sue and settle"

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"Hewitt"

"settlement" in the same sentence as "policy" or "practice" or "timeline" or "rulemaking"

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**From:** Tarczynska, Dominika (USANYS)  
**To:** "Colangelo, Aaron"; "Rahm, Cassie"  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Friday, August 25, 2017 4:19:00 PM

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Aaron,

Apologies for the delay in getting back to you.

In response to NRDC's April 3, 2017 FOIA request, EPA is prepared to conduct a search of records through August 24, 2017 using the following search terms:

- "sue AND settle"
- "sue & settle"
- "oral directive"
- "consent decree" w/ 20 words of "directive" or "policy" or "regulatory"
- "Directive on Consent Decrees and Settlement Agreements"

And will search the documents of the following custodians:

Byron Brown  
Mike Flynn  
Ryan Jackson  
Kevin Minoli  
Elise Packard  
David Fotouhi  
Justin Schwab  
Richard Albores  
Samantha Dravis  
Brittany Bolen  
Shannon Kenny  
George Hull  
Sarah Sowell  
Deborah Szaro  
Carl Dierker  
Catherine McCabe  
Eric Schaaf  
Cecil Rodrigues  
Mary Coe  
Anne Heard  
Mary Wilkes  
Robert Kaplan  
Leverett Nelson  
Samuel Coleman  
Jim Payne  
Edward Chu

Leslie Humphrey  
Deb Thomas  
Kenneth Schefski  
Alexis Strauss  
Sylvia Quast  
Michelle Pizadeah  
Allyn Stern  
Aditi Prabhu  
Derek Mills  
Eric Baptist  
Nancy Grantham  
Elizabeth Bowman  
Amy Graham  
JP Freire  
Caroline Emerson  
Scott Pruitt

These search terms and custodians have been crafted using information from documents that have been identified as potentially responsive to Plaintiff's FOIA request and are more than reasonable. We hope that NRDC will agree not to challenge the adequacy of the search with respect to the April 3, 2017 FOIA request if EPA agrees to perform the foregoing search. Please advise whether you will agree to this.

The analytics of this search have resulted in an estimate of over 10,000 potentially responsive records that will need to be reviewed for responsiveness to NRDC's FOIA request. Accordingly, EPA estimates that it can complete production by April 30, 2018. As I previously told Cassie, EPA is prepared to do rolling monthly productions of responsive documents beginning on October 31, 2018. As a logistical matter, we cannot commit to production of specific custodians or volume by specific dates. EPA will of course work in good faith to review records and intends to do meaningful monthly productions.

I hope that this is acceptable to NRDC and that we can move forward with the review and production of documents rather than expending resources on negotiations over search terms.

Regards,

Dominika

Dominika Tarczynska  
Assistant United States Attorney  
Southern District of New York  
86 Chambers Street, 3rd Floor  
New York, NY 10007  
Tel: (212) 637-2748

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**From:** Rahm, Cassie  
**To:** [Tarczynska, Dominika \(USANYS\)](#); [Colangelo, Aaron](#)  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Thursday, August 31, 2017 4:11:48 PM

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Dominika,

Thanks for this reply. Unfortunately I think we are at an impasse with respect to at least two important points: (1) we cannot agree to an April 2018 production deadline without enforceable interim deadlines, and (2) we cannot agree to waive our right to request additional searches once we see the initial production. If EPA cannot move off its position on these two things, I don't think further discussions will be productive.

I did want to note a couple of things about your proposed search though. The search terms and custodians have changed since our last exchange, and it sounds like that's a result of EPA reviewing some responsive documents. NRDC, of course, has none of the information that resulted in those changes, and so we can't evaluate whether the changes are reasonable—for instance, whether it was reasonable for EPA to delete the search term "settlement." Similarly, the list of custodians has changed, with some additions and some deletions. Again, NRDC is in the dark about EPA's reasons for those changes, and the new names aren't accompanied by the person's position or title at EPA, so it's impossible for us to gauge whether this new list is reasonable. I also wonder if one deletion was just inadvertent—John Reeder, the Deputy Chief of Staff.

Finally, I don't think you responded to my question in one of our exchanges about whether there's someone at EPA who receives and sends emails meant to be received and sent to and from Administrator Pruitt personally. I can't tell if that person is now one of the new names you listed below, but if not (and if such a person exists), I wanted to reiterate that that person should be added to the list. I also can't tell whether you are still proposing only to search Outlook files or if, as I proposed, you'll make a reasonable effort to determine whether any custodian has relevant non-Outlook files and if so, produce those.

In any event, unless EPA will change its position on the first two points, I don't think we should belabor this any longer. NRDC will plan to file a motion asking the Court for a production deadline with respect to this request; we can file that by September 14th. (Under the local rules, EPA will have two weeks for a response, and NRDC one week for a reply.) I think pursuant to the stipulation we should first advise the Court that we were unable to come to an agreement on this request, and that NRDC will file a motion seeking a production deadline. I can draft that letter and will send you a draft to review next week, since I think ideally we would send that letter jointly.

Best,  
 Cassie

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**From:** Tarczynska, Dominika (USANYS) [mailto:[Dominika.Tarczynska@usdj.gov](mailto:Dominika.Tarczynska@usdj.gov)]  
**Sent:** Friday, August 25, 2017 4:19 PM  
**To:** Colangelo, Aaron <[acolangelo@nrdc.org](mailto:acolangelo@nrdc.org)>; Rahm, Cassie <[crahm@nrdc.org](mailto:crahm@nrdc.org)>  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA



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**From:** [Tarczynska, Dominika \(USANYS\)](#)  
**To:** ["Rahm, Cassie"; Colangelo, Aaron](#)  
**Subject:** RE: NRDC v. EPA -- April 3, 2017 FOIA  
**Date:** Friday, September 01, 2017 11:54:00 AM

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Cassie,

With respect to your second point, while we were negotiating search parameters with the hope that we could agree upon a search that would satisfy NRDC and that NRDC would agree not to challenge the adequacy of the search, we understand that NRDC is not willing to do so. Accordingly, we agree that there is no reason to debate the search parameters further. EPA is going to perform the search below, which it believes is more than reasonably targeted to locate the documents responsive to NRDC's FOIA request. We understand that NRDC is reserving its rights to challenge the adequacy of EPA's search. Thus, the only issue that we need to resolve is the timeframe for production.

As I indicated in my email below, EPA is willing to do rolling monthly productions beginning on October 31, 2017, with all production to be completed by April 30, 2018. We can memorialize this commitment to monthly productions in the proposed schedule that we submit to the Court, which I believe should satisfy your concerns about enforceable interim deadlines. Given the very large volume of potentially responsive documents (more than 10,000), the volume of FOIA requests and litigations currently being handled by these program offices (many of which were filed by NRDC), and EPA's resources, we believe that this proposal is reasonable. While we're prepared to brief the production schedule issue, I don't particularly think that it is an efficient use of anyone's resources which would be more effectively devoted towards moving forward in reviewing and producing documents. I am happy to talk further about a production schedule, although I will be out of the office next week so if you would like to discuss on the telephone we should do so today or we can discuss over email next week.

Regards,  
Dominika

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**From:** Rahm, Cassie [<mailto:crahm@nrdc.org>]  
**Sent:** Thursday, August 31, 2017 4:11 PM  
**To:** Tarczynska, Dominika (USANYS) <[DTarczynska@usa.doj.gov](mailto:DTarczynska@usa.doj.gov)>; Colangelo, Aaron

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# NRDC

September 14, 2017

By FedEx

Honorable Lewis A. Kaplan  
United States District Judge  
United States Courthouse  
500 Pearl Street  
New York, NY 10007

Re: NRDC v. EPA, No. 17-cv-3519-LAK

Dear Judge Kaplan,

The parties submit this letter to advise the Court of their inability to agree on a production schedule with respect to one of the four FOIA requests at issue in this case.

On July 20, this Court so-ordered a production schedule agreed to by the parties for the other three FOIA requests at issue in this case. *See* ECF No. 10. The parties agreed to August 31 as the production deadline for two of the requests, and October 31 for the third. (On August 29, defendant EPA moved for an extension of the August 31 deadline to September 19, which was granted by Judge Caproni.)

In the July 18 joint letter, the parties also advised the Court that negotiations with respect to the fourth request, dated April 3, 2017, were ongoing. *See* ECF No. 10. The parties have been unable to resolve their differences on this request, and therefore propose submitting the issue for resolution by motion.

The parties propose that plaintiff NRDC will file a motion by September 22, with answering and reply papers to follow in accordance with Local Civil Rule 6.1(b).

Respectfully submitted,

/s/ Catherine Marlantes Rahm  
Catherine Marlantes Rahm  
Natural Resources Defense Council

**NATURAL RESOURCES DEFENSE COUNCIL**

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*Attorney for Defendant*